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CLERK U S DISTRICT COURT DISTRICT OF ARIZONA	
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

FOREST CONSERVATION
COUNCIL,

Plaintiff,

vs.

UNITED STATES FOREST
SERVICE,

Defendant,

and

NAVAJO COUNTY,
APACHE COUNTY,
CITY OF WINSLOW,
SHOWLOW FIRE DISTRICT,
and AMERICAN FOREST
RESOURCE COUNCIL,

Defendants-Intervenors.

No. CV-03-0054-PCT-FJM

ORDER

This is an action brought by the Forest Conservation Council against the United States Forest Service seeking to enjoin the Forest Service from implementing three separate decisions made in connection with the treatment of dead trees arising out of the Rodeo/Chediski fire. We allowed Navajo County, Apache County, the City of Winslow, the Showlow Fire District, and the American Forest Resource Council to intervene as defendants. The case is here on the parties' cross-motions for summary judgment (doc. 4) and (doc. 9).

1 We have read the parties' voluminous briefing along with the briefs of the many *amici curiae*.
2 We have heard oral argument. We have reviewed the administrative record.

3 The Council has moved to supplement the administrative record. The Forest Service
4 objects only to Exhibits 1(D), 4, 5, 6, 7, 14, and 15. The court has concluded that the cross-
5 motions can be decided as a matter of law without reference to any of the exhibits that are
6 in controversy. Accordingly, IT IS ORDERED GRANTING the Council's motion to
7 supplement the administrative record as to unobjected exhibits, but DENYING the motion
8 as to each of the exhibits to which objection was made.

9 I.

10 The Rodeo-Chediski fire of 2002 involved more than 460,000 acres of which 177,000
11 were within the Tonto and Apache-Sitgreaves National Forests. After consideration, the
12 Forest Service issued three decisions to harvest dead trees on National Forest land. For each
13 decision, the Forest Service decided that compliance with the National Environmental Policy
14 Act, 42 U.S.C. §§ 4321 *et seq.*, was not necessary because of the existence of categorical
15 exclusions within the Forest Service's Handbook. We very briefly describe each of the three
16 decisions and later the categorical exclusions upon which the Forest Service based its
17 decisions.

18 The first Decision Memo, Administrative Record 57, addresses the "Treatment of
19 Dead Trees within or Adjacent to Administrative Sites, Roads, Trails, Developed Recreation
20 Sites, and Concentrated Use Areas." Among other modes of treatment, the decision would
21 allow the salvage logging of dead trees on 14,951 acres. Dead trees would be removed
22 within 500 feet of the boundaries of administrative sites, developed recreation sites, and
23 identified concentrated use areas, within 200 feet of the center line of highly traveled roads
24 open to motor vehicle traffic, and within 100 feet of the center line along heavily used forest
25 system trails.

26 The second Decision Memo, Administrative Record 58, addresses the "Treatment of
27 Dead Trees Along Fences and Utility Lines." Dead trees would be removed within 150 feet
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1 of fences serving as private property boundaries and within 150 feet of utility lines. This
2 would involve 3,008 acres.

3 The third Decision Memo, Administrative Record 59, addresses the "Treatment of
4 Dead Trees in the Wildland/Urban Interface." It would remove dead trees within one-half
5 mile of private land boundaries (the first 150 feet is also permitted under the second Decision
6 Memo discussed above). This would involve 19,364 acres.

7 II.

8 Generally speaking, the National Environmental Policy Act requires federal agencies
9 to prepare an environmental impact statement for major actions significantly affecting the
10 quality of the human environment. An agency must prepare an environmental assessment
11 to determine whether an environmental impact statement is required. An agency may avoid
12 all of this if its action fits within a categorical exclusion which is defined as an action that
13 has no significant effect on the human environment.

14 In each of the three decisions at issue here, the Forest Service performed no
15 environmental assessment. Indeed, counsel for the Forest Service at oral argument conceded
16 that the agency simply believed that its proposed action fit within existing categorical
17 exclusions and moved on from there.

18 In reviewing the Forest Service's decisions, the court's standard of review is quite
19 narrow. We do not judge whether the Forest Service proposals are good or bad, wise or
20 imprudent. The wisdom of any particular decision is vested by operation of law in the
21 agency, not this court. Our role is limited to a determination of whether the agency acted in
22 a way that was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance
23 with the law. 5 U.S.C. § 706(2)(A). We look at the record taken as a whole. And, of critical
24 importance here, an agency's interpretation of its own categorical exclusion controls unless
25 it is plainly erroneous or inconsistent with the terms used in the categorical exclusion. *Alaska*
26 *Ctr. for the Env't v. United States Forest Serv.*, 189 F.3d 851, 857 (9th Cir. 1999). In short,
27 our standard of review is quite deferential.

1 We also keep in mind that the issue before the court is not whether the dead trees
2 should be cut, but only whether the Forest Service violated federal law in choosing not to
3 perform an environmental assessment before deciding to cut them. That in turn depends
4 upon whether the agency's interpretation of its categorical exclusions was plainly erroneous
5 or inconsistent with the terms used in the categorical exclusions. It is to these issues that we
6 now turn.

7 III.

8 As the basis for the categorical exclusion for its first decision, Administrative Record
9 57, which we refer to here as the roads and trails decision, the Forest Service relied upon
10 categorical exclusions 31.1(b)(3), (4), and (5). Categorical exclusion 31.1(b)(3) addresses
11 the "Repair and maintenance of administrative sites, " with examples such as mowing lawns,
12 replacing roofs, painting buildings, or applying pesticides. Categorical exclusion 31.1(b)(4)
13 addresses the "Repair and maintenance of roads, trails and landline boundaries" with
14 examples such as resurfacing roads, grading a road, pruning vegetation and posting landline
15 boundaries. Categorical exclusion 31.1(b)(5) addresses the "Repair and maintenance of
16 recreation sites and facilities" with examples such as applying herbicides to control poison
17 ivy in camp grounds, applying insecticides at recreation sites, repaving a parking lot, and
18 applying pesticides for rodent or vegetation control.

19 The application of these three categorical exclusions to the roads and trails decision
20 is not immediately obvious. Removing dead trees within 500 feet of the boundaries of
21 administrative sites can generally be said to relate to administrative sites. But the examples
22 given (e.g., mowing lawns, replacing roofs) are far more modest than removing dead trees
23 within a 500 foot swath. Similarly, removing dead trees within 200 feet of roads and 100 feet
24 of trails relates generally to the repair and maintenance of roads and trails. Again though,
25 the examples given are far more modest than the action proposed here (grading a road,
26 pruning vegetation). And, removing dead trees within 500 feet of recreation sites generally
27 relates to the repair and maintenance of recreation sites and facilities. But again, the
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1 examples given are far more narrow (applying insecticides and repaving a parking lot). If
2 we were deciding this issue *de novo*, we might have concluded that the action proposed by
3 the roads and trails decision, while within the general description of the categorical
4 exclusions, is far more expansive than the examples given and thus the exclusions would not
5 apply. But we are not reviewing this *de novo*. We must give the agency's interpretation
6 controlling weight unless it is plainly erroneous or inconsistent with the terms used in the
7 categorical exclusion. We cannot say that the agency's interpretation here is inconsistent with
8 the terms used in the categorical exclusion. There is rough comparability. For example, the
9 major environmental impact occurred when the roads went in. We thus cannot say that the
10 agency's interpretation is plainly erroneous.

11 We turn next to the second decision, Administrative Record 58, which we call here
12 the fence and utility line decision. Here, the Forest Service relied upon categorical
13 exclusions 31.1(b)(4) (which we discussed above in connection with the roads and trails
14 decision), and 31.2(2) "Additional construction or reconstruction of existing telephone or
15 utility lines in a designated corridor." Examples include replacing an underground cable
16 trunk and reconstructing a power line. The removal of dead trees within 150 feet of fences
17 is generally within the scope of the repair and maintenance of roads, trails and landline
18 boundaries. And, removing dead trees within 150 feet of utility lines is generally within the
19 scope of the reconstruction of utility lines in a designated corridor. While the proposed
20 actions are generally within the scope of the description, the examples cited are far more
21 narrow. Again, the scope of review controls the outcome. We cannot say that the agency's
22 interpretation is inconsistent with the terms used in the categorical exclusion and thus cannot
23 say that its interpretation is plainly erroneous. This is especially true where, as here, the
24 major environmental impact was considered when the utility lines went in.

25 We turn finally to the third decision, Administrative Record 59, the "Treatment of
26 dead trees in the wildland/urban interface." The Forest Service proposes to remove dead
27 trees within one-half mile of private land boundaries and relies on categorical exclusion
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31.2(6) "Timber stand and/or wildlife habitat improvement activities which do not include the use of herbicides or do not require more than one mile of low standard road construction." Examples given are thinning or brush control to improve growth or to reduce fire hazard, the opening of an existing road to a dense timber stand, and prescribed burning. The removal of dead trees within one-half mile of all private land boundaries does not fit within the general description of timber stand and/or wildlife habitat improvement activities. Nor do any of the examples support such a vast program.

The salvaging of dead timber is covered by categorical exclusion 31.2(4)(b), which specifically addresses timber harvest and salvaging wood from dead or dying trees. But the Forest Service does not rely on this categorical exclusion because its motivation is to create a fire break and because the exclusion was invalidated in *Heartwood v. United States Forest Serv.*, 73 F. Supp. 2d 962 (S.D. Ill. 1999). Even if it did apply, the board feet that it would allow is infinitely less than that proposed here. Indeed, the Forest service has proposed a new salvage timber sale categorical exclusion that would be capped at 250 acres. The wildland/urban interface decision here involves 19,364 acres.

It is thus obvious that categorical exclusion 31.2(6) does not support the Forest Service's decision here. No amount of stretching can make it fit. Unless the deferential standard of review is infinitely elastic, we are constrained to say that the Forest Service's interpretation of categorical exclusion 31.2(6) is inconsistent with its terms and is therefore plainly erroneous.

IV.

By employing the broadest deferential standard, we have upheld the Forest Service's decision to treat dead trees within or adjacent to administrative sites, roads, trails, developed recreation sites, and concentrated use areas, and its decision with respect to the treatment of dead trees along fences and utility lines. But not even the broadest deferential standard could save the Forest Service's decision with respect to the treatment of dead trees in the wildland /urban interface. There remains the question of remedy.

1 The Forest Service argues that even if we were to find that it violated the National
2 Environmental Policy Act, we need not enjoin it with respect to its wildland/urban interface
3 decision. In *Amoco Prods. Co. v. Village of Gambell*, 480 U.S. 531 (1987), the Court
4 acknowledged that the granting of injunctive relief is not automatic. A balancing of
5 respective harms is still required. See also *Alpine Lakes Prot. Soc'y v. Schlapper*, 518 F.2d
6 1089 (9th Cir. 1975). The court notes that the half mile wildland/urban interface decision
7 involves 19,364 acres of the 177,000 acres destroyed by fire on Forest Service land. The
8 parties have advised the court that the Forest Service has already indicated an intent to
9 provide an environmental impact statement on the remaining 150,000 acres.

10 The argument in favor of granting injunctive relief is that, no environmental
11 assessment having been done, it is difficult for the agency or this court to say that the
12 implementation of the wildland/urban interface decision would not have a significant effect
13 on the quality of the human environment. Moreover, the Forest Service could collapse an
14 environmental assessment of the wildland/urban interface acreage with the environmental
15 analysis being undertaken for the remaining 150,000 acres.

16 The argument against granting injunctive relief is that the Forest Service is of the
17 opinion that the one-half mile buffer between the Forest Service and private land would
18 provide a defense zone against future wild fires. We take judicial notice of the fact that a
19 drought plagues Arizona and that forests (other than the ones at issue here) are burning as
20 we write. The Rodeo/Chediski fire burned in a mosaic pattern and it is likely that fuel for
21 another wild fire exists even now. The Forest Service also argues that it does not have the
22 resources to do all the cutting itself and must rely on commercial logging to implement its
23 decision. It argues that the trees will become worthless if not logged soon. For this
24 proposition the Forest Service relies upon *Alpine Lakes Prot. Soc'y v. Schlapper*, 518 F.2d
25 1089 (9th Cir. 1975) and *Friends of the Clearwater v. McAllister*, 214 F. Supp. 2d 1083 (D.
26 Mt. 2002).

The fire occurred about one year ago and there is a suggestion in the record that at about 18 months, dead trees begin to lose their value. Under these circumstances, we think that the balance tips in favor of denying injunctive relief. The Forest Service may proceed, but if it chooses to do so, it must comply with the National Environmental Policy Act by simultaneously preparing an environmental assessment, and, if necessary, an environmental impact statement, on the wildland/urban interface decision. Indeed, it may well be that the environmental impact analysis presently being done with respect to the remaining 150,000 acres will provide most of the answers to the questions raised by this proposal.

V.

Accordingly, IT IS ORDERED as follows.


1. We GRANT the Forest Service's motion for summary judgment (doc. 9) with respect to its decision on the "Treatment of dead trees within or adjacent to administrative sites, roads, trails, developed recreation sites and concentrated use areas," and its decision on the "Treatment of dead trees along fences and utility lines." Administrative Record items 57 and 58. We DENY the remainder of it.

2. We GRANT the Forest Conservation Council's motion for summary judgment (doc. 4) on the Forest Service's decision on the "Treatment of dead trees in the wildland/urban interface." (Administrative Record 59). We DENY the remainder of it.

3. We do not enjoin the Forest Service from implementing its decision with respect to the treatment of dead trees in the wildland/urban interface, but if the Forest Service chooses to go forward, it shall simultaneously prepare an environmental assessment, and, if necessary, an environmental impact statement no later than six months after the filing of this order. Meanwhile, the Forest Service may proceed forthwith.

4. All claims having been resolved, the clerk is directed to enter final judgment.

DATED this 9TH day of July, 2003.


Frederick J. Martone
United States District Judge